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No. 85-1434

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES TIERNEY, *et al.*,

Petitioners,

v.

CITY OF TOLEDO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. INTRODUCTION

This Court could not have been more clear in its decision in *Chicago Teachers Union v. Hudson*, ____ U.S. ____, 54 U.S.L.W. 4231 (March 4, 1986). In unambiguous language, this Court held that a "least restrictive means" analysis must be applied to agency fee collection systems to protect the constitutional rights of all objecting agency fee payors. *Id.*, 54 U.S.L.W. at 4234, n.11 and 12.

The Sixth Circuit did not have the benefit of this analysis when it upheld the City of Toledo ordinance

and the Toledo Police Patrolmen's Association's (TPPA) rebate system, and neither did the TPPA when it created its self-serving rebate mechanism.

Yet, the TPPA argues in its Brief in Opposition to the Petition for a Writ of Certiorari that its rebate scheme fully complies with this Court's decision in *Hudson*. This very predictable response by the TPPA is laughable, in light of the clear mandate of this Court in *Hudson*. Therefore, as was done in *Abernathy v. San Jose Teachers Association*, ____ U.S. ____, 54 U.S.L.W. 3598 (March 10, 1986), this Court must grant the instant Petition for a Writ of Certiorari, and either allow a plenary hearing or vacate and remand the Sixth Circuit's decision for further consideration in light of *Chicago Teachers Union v. Hudson*.[1]

II. ARGUMENT

In *Chicago Teachers Union v. Hudson*, this Court held that before a public employer is allowed to take agency fees from objecting employees, the following must exist:

1) a procedure which minimizes the risk that nonunion employees' contributions might be used for impermissible purposes, such procedure to include a good faith advance reduction in the amount of a voluntary union member's dues;

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[1] It should be noted that the City of Toledo has not filed a Brief in Opposition to the Petition for a Writ of Certiorari. Apparently the City of Toledo now recognizes its governmental responsibility, and agrees with petitioners' argument that the Petition for a Writ of Certiorari should be granted, in light of this Court's holding that "*the government* and the union have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights." *Hudson*, *supra*, 54 U.S.L.W. at 4235, n.20. (Emphasis added.)

2) adequate financial disclosure sufficient to justify the advance reduction in the dues and to allow the employee to intelligently decide whether to object; and

3) a reasonably prompt decision by an impartial decision-maker.

As will now be shown, the Toledo ordinance and TPPA rebate procedure approved by the Sixth Circuit are woefully inadequate to comply with these exacting standards.

A.) In plain language, the *Hudson* decision requires public employee unions to provide agency fee payors with a *bona fide* advance reduction in the amount of the dues. No longer, said this Court, can unions rely upon "a remedy which merely offers dissenters the possibility of a rebate. . ." *Id.*, 54 U.S.L.W. at 4235. However, that is precisely the type of flawed procedure provided by the Toledo ordinance.[2] The TPPA rebate plan, enacted pursuant to the Toledo ordinance, is nothing but a glorified rebate scheme. Under this plan, *nonunion employees are to be deprived of 100% of the voluntary member's dues every year*! There is *never* an advance reduction permitted under the TPPA rebate plan. Admittedly, the TPPA escrows some of the money which the nonmembers must pay, but the overall result is clear: every nonmember must part with 100% of the dues, only to get some back later. As this Court made clear in *Hudson*, the union's

[2] Toledo Municipal Code § 2129.97(a) permits the TPPA to exact an agency fee *equal* to a voluntary member's dues. (*See* Petition Appendix D.) It is undisputed in this case that the TPPA has sought to collect from the petitioners an agency fee equal to the voluntary member's dues, with only a postdeprivation internal union rebate system provided to give petitioners some of their money back.

decision to escrow even 100% of the money does not correct the initial violation which occurs when an excessive and unjustifiable fee is exacted.

Incredibly, TPPA seeks to justify its lawless interpretation of *Hudson* by arguing that "[Unlike the union in Hudson] the TPPA plan does not grant an arbitrary advance reduction for nonmember dues . . . ." (TPPA Brief, pages 6-7.) TPPA fails to admit, however, that it grants *no* advance reduction to petitioners, either arbitrary or otherwise. It continuously seeks payment of 100% of the dues, followed only by a partial escrow and postdeprivation rebate system.

Thus, it is both a cause of sadness and frustration to see the TPPA still arguing in favor of the legality of its rebate scheme, even after the unequivocal *Hudson* holding that "a forced exaction followed by a rebate equal to the amount improperly expended is not a permissible response to the nonunion employees' objections." *Id.*, 54 U.S.L.W. at 4235.

B.) Neither the Toledo ordinance nor the TPPA rebate procedure requires the union to justify, in advance, *why* the fee is set at a given level. Even a cursory review of the TPPA rebate procedure shows that it contains no mechanism by which the union will give "adequate financial disclosure" to the all potential objectors prior to setting the fee and demanding payment. There was certainly no "adequate financial disclosure" provided in the past when TPPA unilaterally demanded 100% of the dues from all nonmembers, with no advance disclosure whatsoever.

TPPA argues that it complies with the "adequate financial disclosure" requirement of *Hudson* because it

provides the nonmembers with "a copy of the TPPA budget" *after* they have objected. Unfortunately for TPPA, however, this Court's requirement of "adequate financial disclosure" encompasses more than just the giving of a copy of the budget after the fee is calculated. This Court made clear in *Hudson* that the adequate financial disclosure must be provided before the amount of the agency fee is set, as part of the union's duty to initially justify the fee.

Furthermore, petitioners simply do not believe that receipt of "a copy of the TPPA budget" satisfies the standards set forth by this Court in *Hudson*. ". . . [A]dequate disclosure surely would include the major categories of expense, as well as verification by an independent auditor."[3] *Hudson*, *supra*, 54 U.S.L.W. at 4235, n.18. The TPPA rebate procedure is silent concerning the use of "independent auditors," and thus it does not comply with *Hudson*.

C.) *Hudson* also requires that an "impartial decisionmaker" hear objections and decide the chargeable amount of the fee. The TPPA rebate procedure states only that the TPPA will "retain" an arbitrator. Nowhere does the rebate procedure state how (or by whom) this private arbitrator will be chosen. Only after this suit was brought did the TPPA's attorney *orally* promise the district court that the "National Academy of Arbitrators"

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[3] This Court even referred to the requirements of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 431(b), as a possible guide for the requirements of this type of adequate financial disclosure. *Hudson*, *supra*, 54 U.S.L.W. at 4235, n.17. For cases which discuss the stringent financial disclosure provisions of 29 U.S.C. § 431(b), *see, e.g.*, *Antal v. District 5, United Mine Workers of America*, 334 F. Supp. 903 (W.D. Pa. 1971), *aff'd*, 451 F.2d 1187 (3d. Cir. 1971).

would choose the arbitrator. This promise, however, appears nowhere in the rebate procedure or the City of Toledo ordinance.[4] Thus, on its face, the TPPA rebate procedure contains the same provision for unilateral selection of the arbitrator that was struck down in *Hudson*. Furthermore, unilateral selection of the "National Academy of Arbitrators" as the body who will choose a decisionmaker to decide petitioners' constitutional rights is only one small step removed from unilateral selection of the arbitrator himself. *See, e.g., Richards v. Merrill, Lynch, Pierce, Fenner and Smith, Inc.*, 64 Cal. Rptr. 899 (1976).

Finally, TPPA argues that its "end of the year" arbitration complies with *Hudson's* requirement that the impartial decisionmaker render a "reasonably prompt decision." (TPPA Brief, page 11.) It strains *Hudson* to the breaking point, however, for TPPA to suggest that an arbitration more than one year after the fees are paid constitutes a reasonably prompt decision. Such a delay is intolerable and cannot be countenanced when First Amendment rights are at stake.

CONCLUSION

Plainly and simply, the City of Toledo and the TPPA have failed to comply with the dictates of *Hudson*. The

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[4] In any event, petitioners do not believe that they should be required to utilize a private arbitration system as a prerequisite to receiving judicial protection of their constitutional rights. Since the private arbitrator's deicision cannot have *res judicata* effect in any subsequent judicial challenge to the agency fee, *McDonald v. City of West Branch*, ____ U.S. ____, 104 S. Ct. 1799 (1984), there is no logical reason to require nonunion employees to exhaust this type of private arbitration system. *See also Patsy v. Board of Regents*, 457 U.S. 496 (1982).

petitioners can no longer be required to be deprived of 100% of the dues, yet this is precisely what the Toledo ordinance and TPPA rebate procedure require every year. The district court specifically found that the TPPA rebate system "does not eliminate entirely all opportunity for the union to use some portion of the [agency fee] for a short period for political purposes," but upheld the constitutionality of that system anyway. That holding was obviously wrong under *Hudson's* "least restrictive means" analysis. Similarly, the Sixth Circuit did not have the benefit of the *Hudson* ruling when it affirmed the district court.

Because the Sixth Circuit issued its *per curiam* opinion prior to this Court's *Hudson* decision, this Court must, at the very least, grant this petition for certiorari and vacate and remand for further consideration in light of *Hudson*. Alternatively, petitioners pray that this Court grant this petition for certiorari and allow a plenary hearing.

Respectfully submitted,

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